Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2005

OSCAR MARTINEZ and IAN BOMKAMP,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

Petition for Writ of Certiorari to the
Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Illinois has but "one unitary appellate court," do diametrically opposed decisions from two separate divisions of the First District Appellate Court, granting a new trial for one jointly-tried codefendant and affirming for two others on the same issue, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

2. Where three codefendants; Martinez, Bomkamp, and Iniguez were all three jointly-indicted and convicted by the same jury on the same evidence in a joint trial – and the Illinois Appellate Court grants a new trial for Iniguez only on the issue of prejudicial gang evidence, yet affirms for Martinez and Bomkamp on the same issue, on the same evidence, without rational basis and without giving a principled reason for acting differently – does that violate due process, equal protection, fundamental fairness, and constitute arbitrariness?

3. Does allowing Illinois to arbitrarily separate the appeals of jointly-tried and identically-situated codefendants – and then issue diametrically inconsistent appeal verdicts – also undermine the policy and reasons for favoring joint trials?

PARTIES INVOLVED

In the appeal proceedings from the judgment entered in the Circuit Court of Cook County, Illinois:

Petitioners, Oscar Martinez and Ian Bomkamp, were the Appellants in the Appellate Court of Illinois, First District. (App. D)

Respondent, People of the State of Illinois, was the Appellee in the Appellate Court of Illinois, First District. (App. D)

* * *

Petitioners were the petitioners in their respective Petitions For Leave To Appeal, denied by the Illinois Supreme Court. (Apps. A, B)

Respondent, People of the State of Illinois, was the respondent in the Petitions For Leave To Appeal, denied by the Illinois Supreme Court. (Apps. A, B)

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2. The disparate treatment of petitioners and their codefendant involves a manifest injustice. Fundamental fairness requires that like cases be treated alike. (U.S. Const. Amend. 14; App. E)

3. The failure of Illinois to grant the same relief for petitioners, or give a principled reason for acting differently in the two appellate decisions (Petitioners, App. D; co-defendant Iniguez, App. G), violates due process and equal protection of the laws. (App. E) This inconsistency from Illinois constitutes obvious arbitrariness.

4. Allowing Illinois to arbitrarily separate the appeals of jointly-tried and identically situated co-defendants – and then issue diametrically inconsistent appeal verdicts – also undermines the policy and reasons for favoring joint trials.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners, Oscar Martinez and Ian Bomkamp, pray that a writ of certiorari issue:

to the Appellate Court of Illinois, First District, to review its Judgment affirming each petitioner's conviction of first degree murder and aggravated battery and sentence of 50 years.

Orders and Opinions Below

The following Orders are all contained in the Separate Volume Appendix to this Petition:

Order of the Appellate Court of Illinois, First Judicial District, First Division, entered June 20, 2005, People v. Oscar Martinez and Ian Bomkamp, Nos. 1-02-2299 and 1-02-2300, Consolidated, affirming convictions and sentences of Martinez and Bomkamp (i.e., affirming judgment of Circuit Court of Cook County, No. 99 CR 12134). This Order is set out at App. D, pp. App. 4-31.

Order of the Appellate Court of Illinois, First Judicial District, entered August 2, 2005, People v. Oscar Martinez and Ian Bomkamp, Nos. 1-02-2299 & 1-02-2300, denying petitions for rehearing. (App. C, p. App. 3)

Order of the Supreme Court of Illinois, entered December 1, 2005, People v. Oscar Martinez et al. (Oscar Martinez, petitioner), No. 101183, denying petition for leave to appeal. (App. A, p. App. 1)

Order of the Supreme Court of Illinois, entered December 1, 2005, People v. Oscar Martinez et al. (Ian Bomkamp, petitioner), No. 101177, denying petition for leave to appeal. (App. B, p. App. 2)

In addition to the above-referenced Orders in petitioners' cases, we also include the following Order, necessary to an understanding of petitioners' position:

Order of the Appellate Court of Illinois, First Judicial District, Second Division, dated September 7, 2005, ordered published as an Opinion *[on motion of appellant Iniguez]* October 18, 2005, People v. Jeff Iniguez, No. 1-02-1182, reversing and remanding judgment of the Circuit Court of Cook County, No. 99 CR 12134.* (App. G, pp. App. 33-57)

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* Iniguez, Martinez, and Bomkamp were jointly tried. Circuit Court of Cook County, case No. 99 CR 12134 – reversed and remanded as to Jeff Iniguez – is the same judgment that was affirmed as to petitioners by a different division of the same appellate court in petitioners' (Martinez' and Bomkamp's) appeal; App. D, pp. App. 4-31.

Jurisdictional Statement

The Order sought to be reviewed was entered by the Appellate Court of Illinois, First District, First Division, on June 20, 2005. (App. D, p. App. 4) The Appellate Court of Illinois, First District, denied petitioners' Petition For Rehearing on August 2, 2005. (App. C, p. App. 3) The Illinois Supreme Court denied leave to appeal as to each petitioner, on December 1, 2005. (Martinez, App. A, p. App. 1; Bomkamp, App. B, p. App. 2)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional Provisions Involved

The federal constitutional provisions involved are the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (App. E, p. App. 32)

STATEMENT OF THE CASE

Statement of Facts

Oscar Martinez, I n Bomkamp, and Jeffrey Iniguez were jointly-indicted in the Circuit Court of Cook County, Illinois, for the December 17, 1998 aggravated battery and first degree murder of Walter Warlyn, Jr. (App. 35) They were jointly-tried before a single jury. (App. 35) They were each found guilty by that jury, and sentenced to prison terms. (App. 4-5, 45)

They each filed separate notices of appeal to the Illinois Appellate Court, First District. (App. 4, 34) They were each assigned separate appeal case numbers in the Appellate Court; Iniguez: 02-1182; Bomkamp: 02-2299; and Martinez: 02-2300. (App. 4, 34) For reasons unknown, the Appellate Court administratively consolidated the appeals of Martinez and Bomkamp, only. (App. 4)

All three of these defendants filed separate Briefs in the Appellate Court raising numerous issues in these direct appeals. (App. 4-31, 34-57) They each raised the issue that the admission of prejudicial gang-related evidence deprived them of a fair trial. (App. 15-17, 35, 51-53) Iniguez raised a jury instruction issue as plain error, that Martinez and Bomkamp did not raise. (App. 4-31, 35, 43-47)

On June 20, 2005 the First Division of the First District Appellate Court, Cahill, P.J., with McBride and O'Malley, JJ., concurring; issued an unpublished Order affirming the convictions and sentences of Martinez and Bomkamp. (App. 4-31)

For Martinez and Bomkamp, in this decision, the Appellate Court held that the admission of gang evidence did not deny them a fair trial. (App. 15-17) The Appellate Court reasoned here that there was evidence in the case that linked these two defendants to the State's theory that the victim's murder was motivated by gang affiliation. (App. 17) The Appellate Court concluded that the fact that Martinez and Bomkamp were "not themselves present" during an earlier fight between two particular gangs, did not "defeat" the State's theory of motive. (App. 17)

Martinez and Bomkamp unsuccessfully petitioned for rehearing, and then each filed separate Petitions for Leave to Appeal in the Illinois Supreme Court. (App. 1-3)

While those petitions for leave to appeal were pending, on September 7, 2005, the Second Division of the First District Appellate Court, Wolfson and Burke, JJ., with Cahill, P.J. dissenting; issued an unpublished Order later published as an Opinion on October 18, 2005 on the motion of Iniguez – reversing and remanding for a new trial

on the same prejudicial gang-related evidence issue rejected by the Appellate Court for co-defendants Martinez and Bomkamp. (App. 34-57, esp. at 51-53)

The Appellate Court also included as grounds for Iniguez' reversal, the jury instruction issue not raised by Martinez and Bomkamp. (App. 43-47)

Concerning the "extensive amount of gang evidence" that was allowed at trial over objection, for co-defendant Iniguez the Appellate Court stated:

> "there was no evidence the defendant was aware of the so-called motivating fact – a street gang fight six months before the killing. [citation omitted.] The effect, if not the purpose, of the gang evidence was to stir the emotions of the jury. Probative value was virtually nil. We find the admission of this evidence was reversible error." (App. 53)

* * *

Martinez and Bomkamp were thereafter granted leave by the Illinois Supreme Court to amend and supplement their pending Petitions for Leave to Appeal, to contend that the Appellate

Court's different treatment of similarly-situated, jointly-tried defendants on direct appeal, re the same (gang evidence) issue, without rational basis, violates due process of law and equal protection of the laws, per the U.S. Const., amend. XIV. (Page 9 of each Amended Supplement to Petition for Leave to Appeal; App. 1, 2)

On December 1, 2005 the Illinois Supreme Court, without comment, issued Orders denying leave to appeal for Martinez and Bomkamp. (App. 1, 2)

* * *

Martinez, Bomkamp, and Iniguez were all three indicted together and convicted by the same jury on the same evidence in a joint trial. (App. 4-31, 34-57) None testified at trial; none was present at a prior gang fight that was the basis for the State presenting gang motive evidence; and the gang evidence admitted as to all three was the same. (App. 4-31, 34-57)

Iniguez is in the Cook County Jail awaiting retrial, at which retrial will be barred the same prejudicial gang evidence, that Martinez and Bomkamp remain imprisoned upon. (App. 4-31, 34-57)

Raising the Federal Question

Petitioners raised the federal question in the Illinois Supreme Court. The question – that the Appellate Court's different treatment of similarly-situated, jointly-tried defendants on direct appeal, *re* the same (gang evidence) issue, without rational basis, violates due process of law and equal protection of the laws, per U.S. Const., amend. XIV – was raised at p. 9 of each petitioner's Amended Supplement to Petition for Leave to Appeal. Leave to Appeal was denied. (Apps. A and B)

This question did not exist until after the Appellate Court affirmed petitioners' convictions and sentences (App. D), yet reversed and remanded in co-defendant Iniguez's case (App. G) – albeit all three were indicted together and convicted by the same jury on the same evidence in a joint trial; none testified; none was present at a prior gang fight that was the basis for the State presenting gang motive evidence; and the gang evidence admitted as to all three was the same. This did not occur until after petitioners had filed their Petitions for Leave to Appeal in the Supreme Court of Illinois. That Court allowed them to amend and supplement their pending PLA's to include the federal question; so petitioners raised it at their earliest opportunity after it came to exist.

REASONS FOR GRANTING CERTIORARI

1. Illinois has laid "an unequal hand on those who have committed intrinsically the same quality of offense." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). By doing so, "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Ibid.

2. The disparate treatment of petitioners and their codefendant involves a manifest injustice. Fundamental fairness requires that like cases be treated alike. (U.S. Const. Amend. 14; App. E)

3. The failure of Illinois to grant the same relief for petitioners, or give a principled reason for acting differently in the two appellate decisions (Petitioners, App. D; co-defendant Iniguez, App. G), violates due process and equal protection of the laws. (App. E) This inconsistency from Illinois constitutes obvious arbitrariness.

4. Allowing Illinois to arbitrarily separate the appeals of jointly-tried and identically situated co-defendants – and then issue diametrically inconsistent appeal verdicts – also undermines the policy and reasons for favoring joint trials.

5. Petitioners respectfully pray that certiorari be granted to review the judgment below.

ARGUMENT

In Illinois, "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill. Const. of 1970, art. VI, § 1. "Although the appellate court is divided into five districts for purposes of election (Ill. Const. 1970, art. VI, § 2), Illinois has but one unitary appellate court." People v. Ortiz, 196 Ill.2d 236, 752 N.E.2d 410, 423 (2001). While there may be no Constitutional right to direct appeal, if a State provides for such appellate review, this Court has left no room for doubt that those courts of review must adhere to "the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts v. Lucey, 469 U.S. 387, 393 (1985).[1]

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[1] "Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. [Citation omitted.] Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' Griffin v. Illinois, 351 U.S. [12], at 18, 76 S.Ct. [585], at 590 [(1956)], the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Evitts v. Lucey, supra.

"Fundamental fairness requires that like cases be treated alike." Walter v. U.S., 969 F.2d 814, 817 (9 Cir. 1992); citing: Griffith v. Kentucky, 479 U.S. 314, 322-24 (1987). "It is a principle requiring particularly strong adherence when the two cases are not merely factually alike or even factually identical, but arise from the same facts." Walter, supra, at 817.

The Ninth Circuit in Walter noted the "necessity of treating identically-situated co-defendants identically." Walter, supra (Disparate treatment of movant and codefendants as to their identical speedy trial arguments involved manifest injustice). "When the federal courts have treated differently two identically-situated defendants, the way must be open to the federal courts to correct their error." Walter, supra; citing: Davis v. United States, 417 U.S. 333, 346-47 (1974).

"Other circuits agree that the federal interest in compliance with appellate procedures is not adequate to warrant treating co-defendants differently on appeal." Walter, supra; citing: U.S. v. Rivera Pedin, 861 F.2d 1522, 1526 n.9 (11 Cir. 1988); U.S. v. Gray, 626 F.2d 494, 497 (5 Cir.), *cert. denied sub nom.*, Fennell v. U.S., 449 U.S. 1038 (1980), *cert. denied*, 449 U.S. 1091 (1981), *cert. denied sub nom.*, Barker v. U.S., 450 U.S. 919 (1981); U.S. v. Anderson, 584 F.2d 849, 853 (6 Cir. 1978).

In Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), this Court reversed a judgment ordering a defendant sterilized under a State statute authorizing sterilization of those convicted of certain enumerated offenses. In Skinner, this Court recognized and applied "the constitutional guaranty of just and equal laws" (316 U.S. at 541):

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 [(1886)]. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins, supra; [State of Missouri ex rel.] Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 [(1938)]." Ibid.

The Illinois Appellate Court (App. D; see also App. G), and Illinois Supreme Court by denying discretionary review (Apps. A & B), have offered no explanation for treating these identically-situated co-defendants differently on appeal. There appears to be no explanation, but for the different whims of

individual Appellate Justices. As in Yick Wo, this arbitrariness, without explanation or accountability, violates due process and equal protection:

> ". . . [I]t would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." Yick Wo, 118 U.S. at 366-67.

In U.S. v. Johnson, 457 U.S. 537 (1982), on the way to its holding that the Payton rule must apply to all cases pending on direct review, this Court embraced the due process/equal protection principle long espoused by Justice Harlan:

> " 'When another similarly situated defendant comes before us, *we must grant the same relief or give a principled reason for acting differently*. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.' " (Emphasis added.) U.S. v. Johnson, 457 U.S. at 548,

quoting from Justice Harlan's dissent in Desist v. U.S., 394 U.S. 244, 258-50 (1969).

GRANT THE SAME RELIEF OR GIVE A PRINCIPLED REASON FOR ACTING DIFFERENTLY. The Illinois Appellate Court has given no principled nor rational reason for acting differently in the cases of Iniguez on the one hand, and Martinez and Bomkamp on the other. The Illinois Supreme Court, confronted with the clear conflict and inequity of the two decisions (App. F, p. App. 33; issue presented in amended supplements to Petitions for Leave to Appeal), refused to intervene. (Apps. A & B)

In U.S. v. Maybury, 274 F.2d 899, 904-06 (2 Cir. 1960), the court held that different outcomes in a bench trial was irrationally inconsistent. The Maybury court reasoned that the fact that the joint trial was a bench trial, and not a jury trial, took the case out of the general rule that appellate courts will not review inconsistent verdicts. Ibid.

In Harris v. Rivera, 454 U.S. 339, 342-43 (1981), this Court questioned the Maybury decision, upholding disparate bench trial verdicts for three co-defendants in a state court. This Court stated though in Rivera, that "inconsistency nevertheless might constitute evidence of arbitrariness that would undermine confidence in the quality of the judge's conclusion." Ibid. This

Court in Harris, went on to give several reasons why the different bench trial results may have happened rationally. Ibid.

There are no reasons at bar why the different results may have happened rationally. This inconsistency from the Illinois Appellate Court and Supreme Court, constitutes obvious evidence of arbitrariness, that undermines confidence in the quality of the conclusion.

We have the bizarre outcome here of Iniguez going to retrial, at which retrial will be barred the same prejudicial gang evidence, that Martinez and Bomkamp remain imprisoned upon.

It is a "manifest injustice" to allow the convictions of Martinez and Bomkamp to stand, while ordering a new trial for Iniguez based upon error in admitting the same evidence, at the same trial. United States v. Anderson, 584 F.2d 849, 853 (6 Cir. 1978) ("manifest injustice" to allow conviction of one codefendant to stand while ordering new trial for other codefendant). The principal "that like cases be treated alike, seems to fall within the spirit, if not the letter, of the law of the case doctrine." Bunker v. Jabe, No. 92-1406 (6 Cir. unpub. opin., 6/10/93), 1993 U.S. App. LEXIS 14453, *pet. for rehearing en banc denied* 8/26/93, *cert. denied sub nom.*, Jabe v. Bunker, 510 U.S. 1025 (1993)(codefendant tried by same jury entitled to

new trial also, notwithstanding new rule of retroactivity; finding federal constitutional violation and granting habeas to State prisoner). (This opinion is set out as App. H, p. App. 58.)

These decisions follow the Constitutional standards and traditions set by this Court for treating similarly situated defendants the same.

In Teague v. Lane, 489 U.S. 288 (1989), this Court expressly accepted this aspect of Justice Harlan's approach, recognizing it had done the same in Griffith v. Kentucky:

> "In Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), we rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that 'failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.' 479 U.S., at 322, 107 S.Ct., at 713." Teague v. Lane, 489 U.S. at 304.

Expressly agreeing with this view, the Teague v. Lane Court continued:

> " 'The integrity of judicial review' requires the application of the new rule to 'all similar cases pending on direct review.' *Id.*, at 323, 107 S. Ct., at 713." Ibid.

Moreover (echoing Justice Harlan's language), in discussing what it had done in Griffith, this Court in Teague v. Lane stated:

> "[B]ecause 'selective application of new rules violates the principle of treating similarly situated defendants the same,' we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final. *Id.*, at 323-324, 107 S.Ct., at 713-714 (citing *Desist, supra*, 394 U.S., at 258-59, 89 S.Ct., at 1038-1039 (Harlan, J., dissenting))." 489 U.S. at 304.

* * *

Permitting Illinois courts of review to rule by coin-flip for separate, but identically-situated defendants, also violates the policy favoring joint trials in criminal cases (as occurred here).

In Richardson v. Marsh, 481 U.S. 200, 205 (1987), this Court stated that "[j]oint trials play a vital role in the criminal justice system, accounting

for almost one-third of federal criminal trials in the past five years." Id. at 209. This Court explained further:

> "Joint trials generally **serve the interests of justice** *by avoiding inconsistent verdicts* and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations joint trials generally **serve the interests of justice** *by avoiding the scandal and inequity of inconsistent verdicts*." Id. at 210. (Emphases added.)

In *accord*, is U.S. v. Zafiro, 506 U.S. 534, 537 (1993), where this Court stated that "joint trials play a vital role in the criminal justice system" by both promoting efficiency and "avoiding the scandal and inequity of inconsistent verdicts." Ibid. (Emphasis added.)

Allowing Illinois to separate the appeals of jointly-tried defendants, and then arbitrarily and without any principled reasons – issue diametrically inconsistent appeal verdicts – undermines the policy and reasons for favoring joint trials.

CONCLUSION

Illinois has laid "an unequal hand on those who have committed intrinsically the same quality of offense." Skinner, supra, 316 U.S. at 541. By doing so, "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." Ibid.

The disparate treatment of petitioners and their codefendant involves a manifest injustice. Fundamental fairness requires that like cases be treated alike. (U.S. Const. Amend. 14; App. E)

The failure of Illinois to grant the same relief for petitioners, or give a principled reason for acting differently in the two appellate decisions (Petitioners, App. D; co-defendant Iniguez, App. G), violates due process and equal protection of the laws. (App. E) This inconsistency from Illinois constitutes obvious arbitrariness.

Allowing Illinois to arbitrarily separate the appeals of jointly-tried and identically situated co-defendants – and then issue diametrically inconsistent appeal verdicts – also undermines the policy and reasons for favoring joint trials.

Petitioners respectfully pray that certiorari be granted to review the judgment below.

Respectfully submitted,

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No.

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October Term, 2005

OSCAR MARTINEZ and IAN BOMKAMP,
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PEOPLE OF THE STATE OF ILLINOIS,
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Petition for Writ of Certiorari to the
Illinois Appellate Court, First District

SEPARATE VOLUME APPENDIX
PURSUANT TO SUPREME COURT RULE 14.1.(i)
RELATIVE TO:
PETITION FOR WRIT OF CERTIORARI

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1. The order(s) entered in conjunction with the judgment(s) sought to be reviewed (Supreme Court Rule 14.1(i)(i)) –

APPENDIX A: Order of the Supreme Court of Illinois, entered December 1, 2005, People v. Oscar Martinez et al. (Oscar Martinez, petitioner), No. 101183, denying petition for leave to appeal. .....App. 1

APPENDIX B: Order of the Supreme Court of Illinois, entered December 1, 2005, People v. Oscar Martinez et al. (Ian Bomkamp, petitioner), No. 101177, denying petition for leave to appeal. .....App. 2

2. The order on rehearing (Supreme Court Rule 14.1(i)(iii)) –

APPENDIX C: Order of the Appellate Court of Illinois, First Judicial District, entered August 2, 2005, People v. Oscar Martinez and Ian Bomkamp, Nos. 1-02-2299 & 1-02-2300, denying petitions for rehearing.....App. 3

3. The judgment sought to be reviewed if the date of its entry is different from the date of the order required in sub subparagraph (i) of this subparagraph (Supreme Court Rule 14.1(i)(iv)) –

APPENDIX D: Order of the Appellate Court of Illinois, First Judicial District, First Division, entered June 20, 2005, People v. Oscar Martinez and Ian Bomkamp, Nos. 1-02-2299 and 1-02-2300, Consolidated, affirming convictions and sentences of Martinez and Bomkamp (i.e., affirming, as to these defendants, the judgment of the Circuit Court of Cook County, No. 99 CR 12134).....App. 4

4. Material required by subparagraph 1(f) (Supreme Court Rule 14.1(i)(v)) –

APPENDIX E: The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.....App. 31

5. Material required by subparagraph 1(g)(i) (Supreme Court Rule 14.1(i)(v)) –

APPENDIX F: Raising the Federal Question. .....App. 32

6. Other material the petitioners believe essential to understand the petition (Supreme Court Rule 14.1(i)(vi)) –

APPENDIX G: Order of the Appellate Court of Illinois, First Judicial District, Second Division, dated September 7, 2005, ordered published as an Opinion *[on motion of appellant Iniguez]* October 18, 2005, People v. Jeff Iniguez, No. 1-02-1182, reversing and remanding judgment of the Circuit Court of Cook County, No. 99 CR 12134*.....App. 33

APPENDIX H: David A. Bunker, Petitioner-Appellant, v. John Jabe, Warden, et al., Respondents, No. 92-1406 (6 Cir., June 10, 1993) (Not Recommended For Publication), 1993 U.S. App. LEXIS 14453, reported as Table Case at 995 F.2d 1066, 1993 U.S. App. LEXIS 21061.....App. 58

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* Iniguez, Martinez, and Bomkamp were jointly tried. Circuit Court of Cook County, case No. 99 CR 12134 – reversed and remanded as to Jeff Iniguez – is the same judgment that was affirmed as to Petitioners by a different division of the same appellate court in Petitioners' (Martinez' and Bomkamp's) appeal; App. D, pp. App. 4-30.

APPENDICES

APPENDIX A

101183 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 1, 2005

Mr. Steven D. Pick
Attorney at Law
1327 W. Washington
104
Chicago, IL 60607

No. 101183 People State of Illinois, respondent, v. Oscar Martinez et al. (Oscar Martinez, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 23, 2005.

APPENDIX B

101177 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 1, 2005

Mr. Dennis Doherty
Attorney at Law
222 North LaSalle St.
Suite 200
Chicago, IL 60601

No. 101177 People State of Illinois, respondent, v. Oscar Martinez et al. (Ian Bomkamp, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 23, 2005.

APPENDIX C

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	Nos. 1-02-2299 1-02-2300
OSCAR MARTINEZ and IAN BOMKAMP, Defendants-Appellants.	)	

ORDER

This cause coming to be heard on the Petitions for Rehearing of Defendants-Appellants, OSCAR MARTINEZ and IAN BOMKAMP, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petitions For Rehearing be DENIED.

Dated at Chicago, Illinois, this __ day of __, 2005.

[Signatures] Kahill
Justice

ORDER ENTERED
AUG 02 2005
APPELLATE COURT, FIRST DISTRICT

M. S. McBride
Justice

Denise M. O'Malley
Justice

APPENDIX D

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION
June 20, 2005

Nos. 1-02-2299 and 1-02-2300, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	**Appeal from the Circuit Court of Cook County.**
Plaintiff-Appellee,	)	
	)	**No. 99 CR 12134**
v.	)	
	)	**Honorable**
OSCAR MARTINEZ and IAN BOMKAMP,	)	**Joseph G. Kazmierski, Jr.,**
Defendants-Appellants.	)	**Judge Presiding.**

ORDER

Defendants Ian Bomkamp and Oscar Martinez were each convicted of first degree murder and aggravated battery and sentenced

to 50 years in prison. Defendants argue in a consolidated appeal: (1) the indictments against them are defective; (2) they were denied a fair trial by the admission of irrelevant and prejudicial gang evidence; (3) their right against self-incrimination was violated by photograph evidence of gang tattoos; (4) they were denied their right to confront witnesses against them; (5) the trial court did not properly instruct the jury; and (6) cumulative error deprived defendants of a fair trial. We affirm. *[p. 2]*

Bomkamp, Martinez and Jeff Iniguez were tried together before a jury for the first degree murder and aggravated battery of Walter Warlyn. The following evidence was presented at their trial.

The victim's father, Roland Warlyn, testified he owned a building in Chicago that housed his catering business. Roland fixed a portion of the building to be used as an apartment for the victim. The victim lived in the apartment and worked at Roland's catering business. Roland was aware that the victim was a heroin user and member of a street gang. On December 16, 1998, Roland gave the victim permission to borrow a white Ford catering van to go out for the evening. When Roland arrived at work the following morning, he noticed the lights in the building had been left on and there were fast food cups lying on the floor. The victim did not show up for work. Roland

learned later that day that his son had been killed.

Chicago police officer D. Finley testified that on December 17, 1998, he was dispatched to Legion Park to investigate a possible death. Finley arrived at Legion Park and saw the victim lying face down. Finley could not feel a pulse on the victim and called for an ambulance. Once the victim's body was turned over, Finley noticed severe trauma to the victim's head and face and a bullet wound to the victim's temple. Finley also noticed a large tattoo on the victim's abdomen. Finlay believed the tattoo represented membership in the Imperial Gangsters street gang. A set of Ford keys was found in the victim's pocket. Finley found a white Ford van parked approximately 100 yards from Legion Park that matched the set of keys.

Chicago police officer Vito Ricciardi testified that he arrested Jill DeShon on a drug charge unrelated to this case in February 1999. After the arrest, Deshon *[sic.]* told Ricciardi she had information relating to the victim's killing. Based on this information, Ricciardi began *[p. 3]* investigating Bomkamp, Martinez and Iniguez.

Jill DeShon testified that on the evening of December 16, 1998, she went to Legion Park with some friends. Bomkamp, who DeShon knew as a ranking member of the Simon City Royals street

gang, was with DeShon at the park. DeShon left the park by herself to meet Bonnie Lopez at a nearby restaurant. DeShon brought Lopez back with her to the park where Bomkamp had remained. DeShon testified that at some point after returning to the park, Martinez and Iniguez arrived at the park. DeShon said Martinez was also ranking member *[sic.]* of the Simon City Royals street gang. Martinez and Iniguez were accompanied by two men whose identity DeShon did not know. The group stayed at the park, drinking alcohol and smoking marijuana. DeShon did not drink but she smoked some marijuana.

DeShon said the group left the park in Martinez's car at approximately 10 or 11 p.m. They drove around for a while looking for drugs and eventually stopped at a social club. Although DeShon and Lopez were allowed to use the club's restroom, the doorman would not let the others inside the club. DeShon saw the victim at the door, talking with Bomkamp, Martinez, Iniguez and the two unknown men. The victim left the club with the group. DeShon got into Martinez's car with Martinez, Iniguez, Lopez and the two unknown men. DeShon saw Bomkamp leave with the victim in a white van. While in the car, DeShon heard Iniguez say "they" were going to beat up the victim.

The victim and Bomkamp followed the

others to Legion Park. Once at the park, DeShon and Lopez walked over to a bench and sat down. The rest of the group stood nearby. DeShon saw Bomkamp, Martinez, Iniguez and the two unknown men start hitting the victim with their fists. The victim fell to the ground and yelled for them to stop. The men then began kicking the *[p. 4]* victim. Bomkamp left the group and walked in the direction of a fence located near the perimeter of the park. Deshon *[sic.]* believed the Simon City Royals commonly hid guns near the fence. Bomkamp returned with a gun and shot the victim. After hearing the gunshot, DeShon told Lopez, who was pretty drunk at the time, to get up. The two women walked over to Martinez's car and got inside. Martinez, Iniguez and one of the two men got into the car with them. The other man stayed behind and fired off more gunshots. DeShon saw Bomkamp go to the victim's van but did not see what, if anything, he did to the van. Bomkamp and the other shooter joined the rest of the group in Martinez's car and they drove away. Iniquez, DeShon and Lopez were dropped off near DeShon's house. Iniguez told DeShon not to say anything about what she had seen at the park.

DeShon said she was arrested by Officer Ricciardi on a drug charge on February 4, 1999. About one week later, DeShon called Ricciardi and told him about the murder. DeShon said she had not contacted police earlier because Iniguez had

threatened her. After her February arrest, DeShon's mother convinced DeShon to contact the police. The police did not offer DeShon a deal in exchange for her testimony against Bomkamp, Martinez and Iniguez.

On cross-examination, DeShon admitted to being a drug user and having been arrested for unlawful use of a weapon and possession of a controlled substance with intent to deliver. DeShon denied telling police about the murder to get lenity on those charges. DeShon was living with Lopez at the time she told Officer Ricciardi about the victim's murder. DeShon told Ricciardi that Lopez had been with her at the park. DeShon denied speaking with Lopez about the murder.

Doctor Tae Lyong An, a forensic pathologist for Cook County, testified he performed an autopsy on the victim. Dr. An saw several abrasions and bruises to the victim's face and body. *[p. 5]* He also saw three gunshot wounds, two entry wounds and one exit wound. Tests showed that the victim had consumed cocaine, heroin and alcohol before he was killed. Dr. An believed the victim's death was caused by multiple gunshot wounds.

Oscar Montanez testified he was a member of the Imperial Gangsters street gang and knew the victim as a fellow member of that gang. Montanez said members of the gang wear the colors black

and pink and receive tattoos depicting the "Imperial Gangster crown." Montanez testified that in the summer of 1998, he and the victim got into a street fight with members of the Simon City Royals. During the fight, the victim threw a can and injured a Simon City Royal. Montanez said neither Bomkamp, Martinez nor Iniguez was present during the fight.

Montanez said that, on December 16, 1998, he was at Bottoms Up Social Club when the victim walked in with a group of Simon City Royals. There were also two women with the group. Montanez said the club was located inside Imperial Gangster territory and told the victim that the group could not enter. The victim told Montanez that it was "cool" and he had grown up with the men in the group. Montanez argued with the victim and would not allow the group to come inside. The two women were allowed inside but only to use the restroom. Montanez saw the victim get into a white van and drive away with the group.

Bonnie Lopez testified she had known Bomkamp for several years. Bomkamp was a ranking member of the Simon City Royals. On December 16, 1998, Lopez was at a restaurant where she met Bomkamp and DeShon. She left with Bomkamp and DeShon and went to Legion Park. They were met at the park by Martinez and

Iniguez. There were others in the park who Lopez did not recognize. Lopez said that, after about an hour, she got inside Martinez's car with Bomkamp, Martinez, Iniguez and Deshon *[sic.]*. The group went to a social club where they met the *[p. 6]* victim. Lopez and DeShon were allowed inside the club to use the restroom but the men were not allowed to enter. After Lopez and DeShon returned from the restroom, the group left the club. Martinez, Iniguez, DeShon and Lopez got into Martinez's car and drove back to the park. Lopez said she was intoxicated at the time and did not remember seeing Bomkamp or the victim at the park. Lopez lay down on a park bench with DeShon and rested. Lopez heard kicking and someone yelling for help. She then heard a gunshot. After the gunshot, DeShon told Lopez to get up. DeShon and Lopez walked to Martinez's car. While walking, Lopez heard a couple more gunshots. She got into the car with DeShon. They were joined by Martinez. Martinez drove DeShon and Lopez away from the park and warned them not to say anything about what had happened. DeShon and Lopez were dropped off near DeShon's house.

Lopez denied discussing the events of that night with DeShon. It was not until February 1999, that the police came to Lopez's house to ask about the victim's murder. Lopez did not contact the police herself because she was afraid of what might

happen to her.

Chicago police officer Joe Rodriguez testified he was a gangs crime specialist for 26 years. Rodriguez was assigned to investigate the victim's murder. He arrested Bomkamp, Martinez and Iniguez in connection with the investigation. Rodriguez identified several photographs of tattoos found on Bomkamp, Martinez and Iniguez while in police custody. Rodriguez testified the tattoos represent the Simon City Royals street gang. Rodriguez also identified photographs of tattoos found on the victim's abdomen that represent the Imperial Gangsters street gang. Rodriguez said the two gangs were fighting in the latter part of 1998. Rodriguez said he was told this fact by Gabriel Flores, who was in custody on a charge unrelated to this case.

John Hart testified he was a forensic scientist employed by the Illinois State Police. Hart *[p. 7]* analyzed a fingerprint and a palm print from the victim's white van. Hart matched both prints to print identification cards made by Bomkamp.

At the conclusion of trial, the jury found Bomkamp, Martinez and Iniguez guilty of first degree murder and aggravated battery. Bomkamp and Martinez were each sentenced to 50 years in prison on the murder charges and a concurrent 5-year prison term on the aggravated battery

charges. Bomkamp and Martinez each appealed and their appeals were consolidated here (Nos. 1-02-2299 and 1-01-2300). Iniguez was sentenced to 40 years in prison. Iniguez has filed a separate appeal from that conviction (No. 1-02-1182). The arguments raised by Bomkamp and Martinez are virtually identical.

Defendants first argue the indictment against them is defective. Defendants maintain counts I and II of the indictment are void because they allege duplicitous mental states. Defendants also maintain Count III of the indictment, which charges felony murder, is void because it is premised on aggravated battery. Our review is *de novo*. See People v. Edwards, 337 Ill. App. 3d 921, 921, 788 N.E.2d 35 (2002).

Count I of the indictment charges that defendants committed first degree murder in that they, without lawful justification, "intentionally *or* knowingly," shot the victim with a gun in violation of section 9-1(a)(1) of the Criminal Code of 1961 (Code)(720 ILCS 5/9-1(a)(1)(West 1998)). (Emphasis added.) Count II charges that defendants committed first degree murder in that they, without lawful justification, "shot and killed [the victim] with a gun knowing that such shooting with a gun created a strong probability of death *or* great bodily harm to [the victim]" in violation of section 9-1(a) (2) of the Code (720 ILCS 5/9-

1(a)(2)(West 1998)). (Emphasis added.) Defendants contend both charges are void because they are duplicitous. *[p. 8]*

Duplicity occurs when two or more distinct offenses are joined in the same count of an indictment. Edwards, 337 Ill. App. 3d at 921. An indictment is not duplicitous if it charges a single offense in more than one way or pleads different acts contributing to the ultimate charged offense. Edwards, 337 Ill. App. 3d at 921. A duplicitous indictment does not set forth the nature and elements of the charge with certainty, rendering the complaint void. Edwards, 337 Ill. App. 3d at 921.

Counts I and II of defendants' indictment are not duplicitous. They charge defendants with distinct offenses: first degree murder under section 9-1(a)(1) of the Code and first degree murder under section 9-1(a)(2) of the Code. There has been no joining of offenses in the separate charges.

The cases relied on by defendants are distinguishable. See People v. Eagle Books, Inc., 151 Ill. 2d 235, 602 N.E.2d 798 (1992); People v. Capitol News, Inc., 137 Ill. 2d 162, 560 N.E.2d 303 (1990); People v. Heard, 47 Ill. 2d 501, 266 N.E.2d 340 (1970). The supreme court in those cases held an indictment that charges a defendant in the disjunctive is void if it alleges disparate and

alternative acts, any one of which would constitute the offense. Eagle Books, 151 Ill. 2d at 244-45; Capitol News, 137 Ill. 2d at 174-75; Heard, 47 Ill. 2d at 504. Counts I and II of defendants' indictment use the disjunctive to allege defendants' mental states. They do not allege disparate and alternative acts. Use of the disjunctive in these circumstances did not cause uncertainty or conjecture as to the crime defendants were charged with committing. People v. Viser, 62 Ill. 2d 568, 580, 343 N.E.2d 903 (1975) (indictment charging alternative mental states for murder does not implicate duplicity concerns).

Because we find counts I and II were properly charged, we need not consider defendants' *[p. 9]* argument with respect to count III, felony murder. See People v. Cardona, 158 Ill. 2d 403, 411, 634 N.E.2d 720 (1994) ("[a] general finding of guilty is presumed to be based on any good count in the indictment to which the proof is applicable").

Defendants next argue the admission of gang evidence deprived them of a fair trial. We will not reverse the trial court's admission of gang evidence absent an abuse of discretion. People v. Johnson, 208 Ill. 2d 53, 102, 803 N.E.2d 405 (2003). Gang evidence is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Johnson, 208

Ill. 2d at 102. Evidence of gang affiliation is relevant if it tends to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Johnson, 208 Ill. 2d at 102.

Defendants first challenge the admission of Oscar Montanez's testimony that he and the victim were involved in a street fight with members of the Simon City Royals in the summer of 1998. Defendants argue the testimony should not have been admitted because there was no evidence that defendants were present or knew about the incident. Defendants cite People v. Smith, 141 Ill. 2d 40, 565 N.E.2d 900 (1990).

The court in Smith held that, while it is entirely proper for the State to prove motive, it is not enough that the State merely produce evidence of motive in the abstract. Smith, 141 Ill. 2d at 57. "The motive must be attributable to the defendant on trial at the time the crime was committed." Smith, 141 Ill. 2d at 57. The State in that case attempted to prove the defendant was motivated by gang affiliation to kill a prison warden who was intolerant of gang activity inside the prison. Smith, 141 Ill. 2d at 58. The only evidence offered to support the theory was that gang activity occurred in the prison, the victim was intolerant of such activity, the victim had *[p. 10]* an altercation with a known gang member and the defendant was

acquainted with the known gang member. Smith, 141 Ill. 2d at 58-59. The court held this was not sufficient evidence to tie the defendant to the State's theory of motive. Smith, 141 Ill. 2d at 58-59.

Unlike Smith, there was evidence in this case that linked defendants to the State's theory that the victim's murder was motivated by gang affiliation. The evidence showed that defendants were members of the Simon City Royals and the victim was a member of the Imperial Gangsters. The gangs did not always get along. The victim had been involved in a street fight with members of defendants' gang months before the murder. And, on the night of the murder, defendants were not allowed inside a club located within Imperial Gangster territory because they were Simon City Royals.

The fact that defendants were not themselves present during the summer street fight does not defeat the State's theory of motive. The summer street fight was evidence that the two gangs did not always get along and supported the State's theory that the gangs were fighting in December 1998, when the victim was murdered. It also supported the State's theory that the victim, who injured a Simon City Royal at the time of the street fight, was a target of the Simon City Royals.

Defendants next challenge the admission of Officer Joe Rodriguez's testimony that the Simon City Royals and the Imperial Gangsters were fighting in the latter part of 1998. Defendants contend the evidence constituted impermissible hearsay and violated their right to confront a witness against them because it was based on an out-of-court statement made by Gabriel Flores, who did not testify at trial. See Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The State does not dispute the inappropriateness of the *[p. 11]* testimony but, rather, argues its admission was harmless beyond a reasonable doubt.

Denial of the right to confront does not warrant a reversal where the error was harmless beyond a reasonable doubt. People v. Wilkerson, 87 Ill. 2d 151, 156-57, 429 N.E.2d 526 (1981). There are three approaches to measuring whether a constitutional error is harmless beyond a reasonable doubt: (1) focusing on the error to decide whether it might have contributed to the conviction; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction; and (3) deciding whether the evidence is cumulative or merely duplicates properly admitted evidence. Wilkerson, 87 Ill. 2d at 157. We find the error in this case harmless beyond a reasonable doubt under the last two approaches.

First, there was overwhelming evidence of defendants' guilt, including eye-witness testimony implicating defendants in the crime. Jill DeShon testified she heard Iniguez say they were going to beat up the victim. DeShon and Oscar Montanez saw Bomkamp get into a van with the victim the night of the murder. Bomkamp's fingerprint and palm print were found on the van. Bomkamp and the victim met the others at Legion Park. DeShon saw defendants hitting and kicking the victim. She then saw Bomkamp get a gun and shoot the victim. Bonnie Lopez heard the fighting and the gunshots. Next, Officer Rodriguez's testimony was cumulative of other evidence showing that the two gangs did not always get along, incluing evidence of the street fight and Montanez's testimony that Simon City Royals were not welcome in Imperial Gangster territory.

Defendants next contend admission of photographic evidence showing their gang tattoos violated their fifth amendment right against self-incrimination. See U.S. Const., amend. V. Defendants maintain the photographs were introduced to show they were members of the Simon City Royals and were communicative or testimonial in nature. The State argues the privilege *[p. 12]* against self-incrimination does not preclude a criminal defendant from being required to exhibit physical characteristics. Holt v. United States, 218 U.S. 245, 252-253, 54 L. Ed. 1021,

1030, 31 S. Ct. 2, 6 (1910). "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Holt, 218 U.S. at 252-253, 54 L. Ed. at 1030, 31 S. Ct. at 6.

We agree defendants *[sic.]* tattoos, unlike other physical characteristics, are "communicative" and "testimonial." But because the tattoos were not compelled communications, they are not entitled to the protections guaranteed under the fifth amendment. See Fisher v. United States, 425 U.S. 391, 409, 48 L. Ed. 2d 39, 55, 96 S. Ct. 1569, 1580 (1976) (the privilege against self-incrimination applies only when the accused is compelled to make an incriminating testimonial communication). We reject defendants' argument that the State's taking of the photographs amounted to compulsion within the meaning of the fifth amendment. "[T]here is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating." United States v. Hubbell, 530 U.S. 27, 34-35, 147 L. Ed. 2d 24, 35, 120 S. Ct. 2037, 2042 (2000), citing Holt, 218 U.S. at 252-253, 54 L.Ed.2d at 1030, 31 S. Ct. at 6. For example, a criminal suspect may be compelled to give a blood,

writing or voice sample even though such conduct may provide incriminating evidence. Hubbell, 530 U.S. at 35, 147 L. Ed. 2d at 35, 120 S. Ct. at 2042. "The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief." Hubbell, 530 U.S. at 35, 147 L. Ed. 2d at 32, 120 S. Ct. at 2042. The photographs here depict images that defendant voluntarily *[p. 13]* had tattooed on their bodies and are not protected by the fifth amendment. See People v. Slavin, 1 N.Y.3d 392, 807 N.E.2d 259 (2004) (photographs of a defendant's tattoos for the purpose of showing motive are not protected by the fifth amendment right against self-incrimination because they do not constitute compelled speech).

The cases cited by defendants are distinguishable. See People v. Alksnis, 291 Ill. App. 3d 347, 682 N.E.2d 1112 (1997); Commonwealth v. Happnie, 3 Mass. App. Ct. 193, 326 N.E.2d 25 (1975); People v. Wong, 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973). At issue in those cases was whether a defendant can exhibit his body as evidence of a fact without being subject to cross-examination. The cases dealt with the testimonial characteristics of such evidence and not whether the evidence was compelled within the meaning of the fifth amendment.

Defendants next argue they were denied their right to confront Jill DeShon, Bonnie Lopez and Oscar Montanez. Defendants cite several instances where the trial court sustained objections by the State during the defense's cross-examination of these witnesses.

The right of an accused to confront a witness against him includes the right to cross-examine. People v. Blue, 205 Ill. 2d 1, 12, 792 N.E.2d 1149 (2001). But the scope of such cross-examination is limited to the subject of direct examination and permissible matter that affects the witness's credibility. Blue, 205 Ill. 2d at 13. The trial court has discretion to impose reasonable limits on cross-examination to guard against harassment, prejudice, jury confusion, witness safety or repetitive and irrelevant questioning. Blue, 205 Ill. 2d at 13. This discretionary authority arises only after the court has permitted sufficient cross-examination to satisfy the confrontation clause. Blue, 205 Ill. 2d at 13.

Defendants cite 57 instances where they believe they were denied their right to confront *[p. 14]* DeShon. The first set of challenges is to testimony the defense sought to elicit about crimes committed by DeShon. The record shows the defense was given leeway to cross-examine DeShon about these crimes in an attempt to discredit her in front of the jury. The additional examination

defendants sought to conduct was repetitive and irrelevant. The second set of challenges concerns testimony intended to show that DeShon had a motive to fabricate her testimony against defendants. Again, this testimony would have been repetitive. Defendants were allowed an opportunity to question DeShon extensively concerning her bias and motives to fabricate. The next set of challenges relates to the extent, if any, of DeShon's communications with Lopez after the murder. Defendants were permitted to ask DeShon whether she spoke with Lopez about the murder. That defendants did not like her answers to their inquiry does not amount to a denial of the right to confront, nor does it give defendants the right to ask repetitive questions on the subject. Defendants next challenge testimony sought to elicit testimony about DeShon's drug habits. Again, the defense was allowed to question DeShon on this subject. Defendants' final set of challenges concerns alleged prior inconsistent statements to police. Defendants were given wide latitude in examining DeShon with respect to statements she made to police, including inconsistencies and omissions within those statements. The record shows defendants were not denied their right to confront DeShon through cross-examination and the trial court correctly exercised its discretion in sustaining the State's objections to repetitive and irrelevant testimony.

Defendants next challenge testimony they were prohibited from eliciting from Bonnie Lopez. Defendants first argue they should have been able to question Lopez about the extent, if any, she spoke with DeShon about the murder. Defendants were allowed to ask such questions. *[p. 15]* The trial court merely sustained objections to repetitive questioning on this subject. Defendants next challenge a question to Lopez about a prior inconsistent statement that Lopez admitted making. The trial court correctly sustained the State's objection to a follow-up question that was argumentative. Defendants next argue they were denied their right to ask Lopez about confusion over the exact day the victim was murdered. The record shows this line of questioning was also argumentative and was properly objected to on this ground. There is no dispute that the victim was killed in the evening of December 16, 1998, or early morning hours of December 17, 1998. The trial court also properly sustained objection to defendants' questioning of Lopez about her memory of that night as argumentative. Defendants next challenge the State's objections to questions relating to Lopez's knowledge of DeShon's motives to fabricate. The trial court properly sustained the objections as speculative and argumentative. The court also properly sustained objections to repetitive questioning about prior inconsistent statements and Lopez's failure to contact police, as well as argumentative

questions about Lopez's conversations with DeShon.

Defendants' final set of challenges relates to Oscar Montanez's testimony. Defendants first argue they were denied the right to question Montanez regarding whether he spoke with Gabriel Flores about the police investigation. Defendants maintain the questioning was relevant to whether Montanez fabricated his testimony. The record shows defendants were permitted to develop this line of questioning. We see no denial of the right to confront on this issue. Defendants next argue the trial court erred in sustaining an objection to a question relating to Montanez's motive for testifying. The trial court properly sustained the objection as argumentative. Defendants argue the trial court erred in sustaining an objection to a question *[p. 16]* concerning the rivalry between the Simon City Royals and the Imperial Gangsters. The objection was properly sustained on the ground that the question was repetitive. Finally, defendants argue they were denied their right to confront when the trial court sustained the State's objection to a question directed at whether Montanez knew of the victim's heroin use. The objection was properly sustained because the question was irrelevant and evidence of the victim's heroin use had already been admitted.

Defendant were not denied their right to

confront the witnesses against them. To the contrary, we find that they were equipped with attorneys who performed competent and zealous cross-examinations of the witnesses. As noted earlier, the right to cross-examine is not without limitation. The trial court properly exercised discretion to limit the defense from irrelevant, repetitive and argumentative questioning.

Defendants next challenge three of the jury instructions. Defendants first argue the trial court erred in refusing to give defendants' tendered Illinois Patter *[sic.]* Jury Instruction 3.17 (IPI 3.17), advising the jury on the unreliability of accomplice testimony. That instruction reads:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

An accomplice instruction should be given if there is probable cause to believe the witness was guilty either as a principal or under a theory of accountability. People v. Cobb, 97 Ill. 2d 465, 476, 455 N.E.2d 31 (1983). An accomplice is one who

could himself have been indicted for the *[p. 17]* offense either as a principal or as an accessory. Cobb, 97 Ill. 2d at 476. We will not reverse the trial court's refusal to give an accomplice instruction absent an abuse of discretion. See People v. Davis, 213 Ill. 2d 459, 821 N.E.2d 1154 (2004).

Defendants maintain they were entitled to a cautionary accomplice instruction with regard to DeShon's testimony. Defendants cite People v. Carreon, 162 Ill. App. 3d 900, 516 N.E.2d 372 (1987), as analogous to this case. The court in that case held the jury should have been given an accomplice instruction with regard to a witness who testified against the defendant where the witness was with the defendant before the crime, followed the defendant's direction during the commission of the crime, remained with the defendant after the crime, shared in the proceeds of the crime with the defendant and did not contact the police to report the crime. Carreon, 162 Ill. App. 3d at 994-95. Defendants also cite People v. Love, 285 Ill. App. 3d 784, 674 N.E.2d 824 (1996). The court there held an accomplice instruction was appropriate where a witness against the defendant was part of the defendant's drug operation and the crime the defendant was accused of committing was in furtherance of the drug operation. Love, 285 Ill. App. 3d at 792. Although there was no evidence that the witness

had knowledge of the crime, the witness was part of the illegal enterprise that the defendant was arguably intending to further by committing the crime. Love, 285 Ill. App. 3d at 792.

The distinguishing factor between Carreon and Love and this case is the absence of evidence that DeShon benefitted from the crime. The witness in Carreon received cash proceeds from the crime. Carreon, 162 Ill. App. 32d at 995. The witness in Love was part of the unlawful enterprise that was furthered by the crime. Love, 285 Ill. App. 3d at 792. The evidence here merely showed that DeShon was with defendants the night of the offense and was present at the *[p. 18]* park when defendants murdered the victim. See Cooper, 194 Ill. 2d at 434 (mere presence during the commission of a crime is insufficient to warrant an accomplice instruction). There was no evidence that DeShon aided or abetted in the killing or that she benefitted from the victim's murder.

Defendants next argue the trial court erred in refusing to give the jury a non-IPI addict instruction with regard to DeShon's testimony. An addict instruction advises the jury that the testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs or alcohol. See Federal Jury Practice & Instruction, Criminal, No. 15.05 (5th ed. 2001).

The decision of whether to give a non-IPI instruction rests within the sound discretion of the trial court. People v. Simms, 192 Ill. 2d 348, 412, 736 N.E.2d 1092 (2000). An abuse of discretion is committed only where there is no IPI instruction that applies to the particular subject. Simms, 192 Ill. 2d at 412.

While parties are entitled to cross-examine witnesses about drug use, they are not entitled to have the jury instructed on the unreliability of testimony by drug addicts. People v. Armstrong, 183 Ill. 2d 130, 146, 700 N.E.2d 960 (1998). It is not reversible error to deny a tendered addict instruction where evidence of the addiction is before the jury. People v. Steidl, 142 Ill. 2d 204, 238, 568 N.E.2d 837 (1991). " 'Jurors do not leave their common sense behind when they enter court, and even in the absence of cautionary instructions they will ordinarily be aware of the factors which make some witnesses unreliable.' " Steidl, 142 Ill. 2d at 238, quoting People v. Rollins, 108 Ill. App. 3d 480, 488, 438 N.E.2d 1322 (1982).

The jury here was informed of DeShon's drug addiction and drug use on the night in question. The defense used this evidence to discredit DeShon before the jury. An addict *[p. 19]* instruction would have placed undue emphasis on the evidence. The jury here was properly instructed as follows:

> "Only you are the judges of the believability of the witnesses and of the weight to be given the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

See IPI 1.02 (Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000)). This instruction adequately informed the jury of the basis on which it should evaluate DeShon's testimony, including her ability to observe and her memory. The trial court did not abuse its discretion by refusing to give defendant's addict instruction.

Lastly, defendants argue the jury was improperly instructed that aggravated battery could serve as a predicate for felony murder. Defendants cite People v. Morgan, 197 Ill. 2d 404, 447, 758 N.E.2d 813 (2001), for the proposition that, "where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder." But defendants' aggravated battery of the victim, the hitting and

kicking of the victim, was not inherent in, nor did it arise out of, the act of murder itself. The victim died from multiple gunshot wounds–accomplished by shooting the victim–and not injuries resulting from defendants' beating of the victim. See Davis, 213 Ill. 2d at 473-75 (Morgan applies only where the act constituting the underlying felony was inherent in, and arose out of, the killing). The jury was properly instructed on felony murder. *[p. 20]*

Because we reject all of defendants' contentions of error, we also reject defendants' contention that cumulative error deprived them of a fair trial. Defendants' convictions are affirmed.

Affirmed.

CAHILL, P.J., with McBRIDE and O'MALLEY, JJ., concurring.

APPENDIX E

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution

U.S. Const., amend. XIV, Section 1:

> "[n]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX F

RAISING THE FEDERAL QUESTION

Petitioners raised the federal question in the Illinois Supreme Court. The question – that the Appellate Court's different treatment of similarly-situated, jointly-tried defendants on direct appeal, *re* the same (gang evidence) issue, without rational basis, violates due process of law and equal protection of the laws, per U.S. Const., amend. XIV – was raised at p. 9 of each petitioner's Amended Supplement to Petition for Leave to Appeal. Leave to Appeal was denied. (Apps. A and B)

This question did not exist until after the Appellate Court affirmed petitioners' convictions and sentences (App. D), yet reversed and remanded in co-defendant Iniguez's case (App. G) – albeit all three were indicted together and convicted by the same jury on the same evidence in a joint trial; none testified; none was present at a prior gang fight that was the basis for the State presenting gang motive evidence; and the gang evidence admitted as to all three was the same. This did not occur until after petitioners had filed their Petitions for Leave to Appeal in the Supreme Court of Illinois. That Court allowed them to amend and supplement their pending PLA's to include the federal question; so petitioners raised it at their earliest opportunity after it came to exist.

APPENDIX G

SECOND DIVISION
October 18, 2005
[Issued as unpublished Rule 23 Order dated 9/7/05; issued as published Opinion dated 10/18/05 on motion of Appellant Iniguez.]*

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-02-1182

THE PEOPLE OF THE STATE OF ILLINOIS,	)	**Appeal from the Circuit Court of Cook County.**
Plaintiff-Appellee,	)	**No. 99 CR 12134**
v.	)	**Honorable Joseph G. Kazmierski, Jr., Judge Presiding.**
JEFF INIGUEZ,	)	
Defendant-Appellant.	)	

JUSTICE WOLFSON, delivered the opinion of the court:

[* [Footnote, added by petitioners' counsel.] The Rule 23 Order cites Illinois cases by official citation only, while the Opinion includes the parallel West (N.E.2d) cites. App. G includes both, with N.E.2d cites in brackets.]

Defendant Jeff Iniguez was convicted of first degree murder and aggravated battery. The trial court sentenced him to 40 years in prison for murder and a concurrent 5-year term for aggravated battery. On appeal, defendant contends (1) the trial court erred in instructing the jury on the reliability of eyewitness testimony; (2) he was denied a fair trial by the admission of prejudicial and excessive gang evidence; (3) the indictment against him was deficient; (4) the State's eyewitness testimony was insufficient to prove his guilt beyond a reasonable doubt; and (5) the State failed to prove his guilt on a theory of accountability. We reverse and remand. *[p. 2]*

FACTS

Ian Bomkamp, Oscar Martinez, and defendant were tried together before a jury for the first degree murder and aggravated battery of Walter Warlyn. The following evidence was presented at their trial.

The victim's father, Roland Warlyn, testified he owned a building in Chicago that housed his catering business. The victim lived in the apartment in the building and worked at Roland's catering business. Roland was aware that the victim was a heroin user and a member of a street gang. On December 16, 1998, Roland gave the victim permission to borrow a white Ford catering

van to go out for the evening. When Roland arrived at work the following morning, he noticed the lights in the building had been left on and fast food cups were lying on the floor. The victim did not show up for work. Roland learned later that day that his son had been killed.

Chicago police officer D. Finley testified that on December 17, 1998, he was dispatched to Legion Park to investigate a possible death. Finley arrived at Legion Park and saw the victim lying face down. Finley could not feel a pulse on the victim and called for an ambulance. Once the victim's body was turned over, Finley noticed severe trauma to the victim's head and face and a bullet wound to the victim's temple. Finley also noticed a large tattoo on the victim's abdomen. Finley believed the tattoo *[p. 3]* represented membership in the Imperial Gangsters street gang. He found a set of Ford keys in the victim's pocket. A white Ford van parked approximately 100 yards from Legion Park matched the set of keys.

Chicago police officer Vito Ricciardi testified that he arrested Jill DeShon on a drug charge unrelated to this case in February 1999. After the arrest, DeShon told Ricciardi she had information relating to the victim's killing. Based on this information, Ricciardi began investigating Bomkamp, Martinez, and defendant.

DeShon testified that on the evening of December 16, 1998, she went to Legion Park with some friends. Bomkamp, a ranking member of the Simon City Royals street gang, was with DeShon in the park. DeShon left the park by herself to meet Bonnie Lopez at a nearby restaurant. DeShon brought Lopez back with her to the park where Bomkamp had remained. DeShon testified that at some point after returning to the park, Martinez, also a ranking member of the Simon City Royals gang, and defendant arrived. Martinez and defendant were accompanied by two men whom DeShon did not know. The group stayed at the park drinking alcohol and smoking marijuana. DeShon did not drink but she smoked some marijuana.

DeShon said the group left the park in Martinez's car at approximately 10 or 11 p.m. They drove around looking for drugs *[p. 4]* and eventually stopped at a social club. Although DeShon and Lopez were allowed the use the restroom, the doorman would not let the others inside the club. DeShon saw the victim at the door talking with Bomkamp, Martinez, defendant, and the two unknown men. The victim left the club with the group. DeShon got into Martinez's car with Martinez, defendant, Lopez, and the two men. DeShon saw the victim and Bomkamp leave in a white van. While in the car, DeShon heard defendant say they were going to beat up the victim.

The victim and Bomkamp followed the others to Legion Park. Once at the park, DeShon and Lopez sat down on a bench. The rest of the group stood nearby. DeShon saw Bomkamp, Martinez, defendant, and the two unknown men start hitting the victim with their fists. The victim fell to the ground and yelled for them to stop. The men then began kicking the victim. Bomkamp left the group and walked in the direction of a fence located near the park's perimeter. DeShon believed the Simon City Royals commonly hid guns near the fence. Bomkamp returned with a gun and shot the victim. After hearing the gunshot, DeShon told Lopez, who was drunk at the time, to stand. The women walked over to Martinez's car and got inside. Martinez, defendant, and one of the other men got into the car with them. The other man stayed behind and fired off more gunshots. DeShon saw Bomkamp go to the victim's van but did not see what, if anything, he did to the *[p. 5]* van. Bomkamp and the other shooter joined the rest of the group in the car and drove away. Defendant, DeShon, and Lopez were dropped off near DeShon's house. Defendant told DeShon not to say anything about what she had seen at the park.

DeShon said she was arrested by Officer Ricciardi on a drug charge on February 4, 1999. Approximately one week later, DeShon called Ricciardi and told him what happened on

December 16, 1998. DeShon's mother convinced her to contact police after she was arrested. DeShon said she had not contacted police earlier because defendant had threatened her. Deshon *[sic.]* testified that the police did not offer her a deal in exchange for her testimony against Bomkamp, Martinez, and defendant.

On cross-examination, DeShon admitted using a variety of drugs, including LSD, cocaine, mushrooms, PCP, Valium, amphetamines, and marijuana. DeShon admitted she had been arrested for unlawful use of a weapon and possession of a controlled substance with intent to deliver. After her arrest, she told police about the shooting. Deshon *[sic.]* pleaded guilty to the charges, was placed on probation, and immediately broke the terms of her probation. She moved to Colorado and dropped out of a drug rehabilitation program. DeShon remained a fugitive until March 27, 2001.

DeShon denied telling police about the murder to get lenity on those charges. DeShon gave a written statement to police and *[p. 6]* testified before the grand jury. In both instances, she said she met the victim on the evening of December 17, 1998. When asked about her previous statement, DeShon testified she "did not know" the victim was found dead the morning of December 17, 1998. DeShon admitted she

provided a time line of the shooting to police in February 1999, but did not remember telling a detective the victim was killed between 10 and 10:30 p.m.

Doctor Tae Lyong An, a forensic pathologist for Cook County, testified he performed an autopsy on the victim. Dr. An saw several abrasions and bruises on the victim's face and body. He also saw three gunshot wounds–two entry wounds and one exit wound. Tests showed that the victim had consumed cocaine, heroin, and alcohol before he was killed. Dr. An believed the victim's death was caused by multiple gunshot wounds.

Oscar Montanez testified he was a member of the Imperial Gangsters street gang and knew the victim as a fellow gang member. Montanez said members of his gang wear the colors black and pink and receive tattoos depicting the Imperial Gangster crown. Montanez testified that in the summer of 1998, he and the victim got into a street fight with members of the Simon City Royals. During the fight, the victim threw a can and injured a Simon City Royal *[sic.]* member. Montanez said neither Bomkamp, Martinez, nor defendant was present during the fight.

Montanez testified that he was at the Bottoms Up Social Club *[p. 7]* on December 16, 1998, when the victim walked in with a group of

Simon City Royals. There were also two women in the group. Montanez said the club was located inside Imperial Gangster territory and told the victim that the group could not enter. The victim told Montanez that "it was cool" and that he had grown up with the men in the group. Montanez argued with the victim and would not allow the group to come inside. The two women were allowed inside but only to use the restroom. Montanez saw the victim get into a white van and drive away with the group.

Bonnie Lopez testified she had known Bomkamp for several years and that he was a ranking member of the Simon City Royals. On December 16, 1998, Lopez was at a restaurant where she met Bomkamp and DeShon. She left with Bomkamp and DeShon and went to Legion Park. Martinez and defendant joined them there. Lopez did not recognize others in the park. After one hour, she went with Bomkamp, Martinez, DeShon, and defendant to a social club where they met the victim. Lopez and DeShon used the club's restroom, but the others were not admitted inside. Lopez returned to the park with Martinez, DeShon, and defendant.

Lopez admitted she was intoxicated at the time and did not remember seeing Bomkamp or the victim at the park. She lied down on a park bench and rested. She heard kicking, someone

yelling for help, and a gunshot. After the gunshot, DeShon told Lopez to get up, and the two women walked back to Martinez's car. While *[p. 8]* walking, Lopez heard two more shots fired. She and Deshon *[sic.]* got into the car and were joined by Martinez. He warned the two women not to say anything about what happened and dropped them off near DeShon's house. Lopez denied discussing the events with DeShon. Lopez did not talk to police until February 1999, when they came to her house to ask about the victim's murder. Lopez said she did not contact police out of fear of what might happen to her.

Chicago police officer Joe Rodriguez testified he had worked as a gang crimes specialist for 26 years. Rodriguez was assigned to investigate the victim's murder. He arrested Bomkamp, Martinez, and defendant in connection with the investigation. Rodriguez identified several photographs of tattoos found on Bomkamp, Martinez, and defendant while they were in police custody. Rodriguez testified the tattoos represent the Simon City Royals street gang. Rodriguez also identified photographs of tattoos found on the victim's abdomen that represent the Imperial Gangsters street gang. Rodriguez said the two gangs were fighting in the latter part of 1998.

John Hart testified he was a forensic scientist employed by the Illinois State Police. Hart

analyzed a fingerprint and a palm print lifted from the victim's white van. Hart matched both prints to print identification cards made by Bomkamp.

The defense called Chicago police officer Dwayne Johnson as *[p. 9]* a witness. Johnson testified he was assigned to investigate the victim's death. Johnson found a watch, bracelet, and piece of paper near the victim's body. These items were not inventoried or tested. Nor was testing performed on the jacket the victim wore at the time of the shooting. On December 17, 1998, the victim's father told Johnson he saw empty fast food cups lying around when he arrived at work the morning after his son was killed. Johnson did not analyze the cups or search the area for fingerprints.

At the conclusion of trial, the jury found defendant guilty of first degree murder and aggravated battery. Defendant was sentenced to 40 years' imprisonment for first degree murder and a concurrent 5-year prison term for aggravated battery.

DECISION

I. Jury Instructions

A. IPI 3.15

On appeal, defendant challenges the use of

Illinois pattern Jury Instruction 3.15 (IPI 3.15) (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 1000 *[sic.]*)). At the time of defendant's trial, IPI 3.15 read:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to the following: *[p. 10]*
>
> [1] The opportunity the witness had to view the offender at the time of the offense.
>
> [or]
>
> [2] The witness's degree of attention at the time of the offense.
>
> [or]
>
> [3] The witness's earlier description of the offender.
>
> [or]
>
> [4] The level of certainty shown by the witness when confronting the defendant.
>
> [or]

> [5] The length of time between the offense and the identification confrontation." Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000).

The instruction has since been changed to omit the word "or" between each of the five factors. See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000)(Supp. 2003).

Defendant contends the use of the word "or" between the factors improperly instructed the jury it could consider any of the five individual factors rather than all of the factors in evaluating DeShon's identification testimony. The State responds *[p. 11]* that defendant has waived the argument by failing to object to the instruction at trial or raise the issue in a posttrial motion. We agree. Defendant's failure to challenge the instruction at trial or in his posttrial motion forfeited review of the issue. See People v. Harvey, 211 Ill. 2d 368, 385 [813 N.E.2d 181, 192] (2004) (a defendant's failure to object at trial and to raise the issue in a posttrial motion operates as a waiver of the right to raise the issue as a ground for reversal on review).

We nonetheless review defendant's argument under the plain error doctrine. See People v. Herron, 215 Ill. 2d 167 [830 N.E.2d 467,

482] (2005). In Herron, the Illinois Supreme Court found use of "or" between the factors of IPI 3.15 rendered the instruction "ambiguous and misleading, regardless of any further comment on it by the State in its closing argument."[1] Herron, 215 Ill. 2d at 191 [830 N.E.2d at 482]. The court said, "giving IPI Criminal No. 3.15 with the 'ors' is indeed plain error." Herron, 215 Ill. 2d at 191 [830 N.E.2d at 482]. But that does not mean reversal of defendant's conviction is automatic. See Herron, 215 Ill. 2d at 192-93 [830 N.E.2d at 482-83]. Defendant has the burden of showing the "evidence was so closely balanced that the error alone severely threatened to tip the scales of justice *[p. 12]* against him." Herron, 215 Ill. 2d at 187 [830 N.E.2d at 479].

A case relying almost entirely on the self-contradictory testimony of a drug-using intoxicated witness who contacted the police two months after the killing, when she was facing two felony charges and was a fugitive for two years before testifying, hardly can be characterized as an odds-on favorite for the State. This was a close case. It would not take much to tip the scales one way or the other.

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[1] We reserved ruling in this case until the supreme court decided the jury instruction issue in Herron because we understood it would be outcome determinative.

Given that setting, we find it reversible error to give the defective identification instruction, IPI 3.15. See Herron, 215 Ill. 2d at 191 [830 N.E.2d at 482]. Because the evidence was so closely balanced, the error "severely threatened to tip the scales of justice against" the defendant. Accordingly, we reverse his conviction and remand the cause for a new trial. See Herron, 215 Ill. 2d at 187 [830 N.E.2d at 479].

Because we are remanding for a new trial, we will consider other claims of error that could again surface.

B. The non-IPI instruction on witnesses who are addicts

Defendant contends the trial court erred in refusing to give the jury a non-IPI addict instruction. The State responds that the trial court adequately instructed the jury on DeShon's credibility.

The decision of whether to give a non-IPI instruction rests within the sound discretion of the trial court. People v. Simms, *[p. 13]* 192 Ill. 2d 348, 412 [736 N.E.2d 1092, 1133] (2000). An abuse of discretion is committed only where there is no IPI instruction that applies to the particular subject. Simms, 192 Ill. 2d at 412 [736 N.E.2d at 1133]. The trial court here instructed the jury as

follows:

> "Only you are the judges of the believability of the witnesses and of the weight to be given the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

The parties on appeal mistakenly refer to this instruction as IPI 3.12 but the instruction parallels IPI 1.02 (Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000)).

Defendant argues the above instruction alone was insufficient to instruct the jury on the reliability of DeShon's testimony. Defendant contends the jury should have been given his tendered federal pattern jury instruction relating to addict testimony. See Federal Jury Practice & Instruction, Criminal, No. 15.05 (5th ed. 2001). The instruction advises the jury that *[p. 14]* the testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs or alcohol. See Federal Jury Practice

& Instruction, Criminal, No. 15.05 (5th ed. 2001).

While parties are entitled to cross-examine witnesses about drug use, they are not entitled to have the jury instructed on the unreliability of testimony by drug addicts. People v. Armstrong, 183 Ill. 2d 130, 146 [700 N.E.2d 960, 967] (1998). Nor is it reversible error to deny a tendered addict instruction where evidence of the addiction is before the jury. People v. Steidl, 142 Ill. 2d 204, 238 [568 N.E.2d 837, 851] (1991). " 'Jurors do not leave their common sense behind when they enter court, and even in the absence of cautionary instructions they will ordinarily be aware of the factors which make some witnesses unreliable.' " Steidl, 142 Ill. 2d at 238 [568 N.E.2d at 851], quoting People v. Rollins, 108 Ill. App. 3d 480, 488 [438 N.E.2d 1322, 1328] (1982).

The jury was informed of DeShon's drug addiction and drug use on the night in question. The defense used this evidence to discredit DeShon before the jury. An addict instruction would have placed undue emphasis on the evidence. IPI 1.02, on the other hand, adequately informed the jury of the basis on which it should evaluate DeShon's testimony, including her ability to observe and her memory. The trial court did not abuse its discretion by refusing to give defendant's addict instruction.

C. IPI 3.17 *[p. 15]*

Defendant contends the trial court erred in refusing to instruct the jury on the unreliability of accomplice testimony. Specifically, defendant challenges the trial court's refusal to use Illinois Pattern Jury Instruction 3.17 (IPI 3.17), which reads:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

An accomplice instruction should be given if there is probable cause to believe the witness was guilty either as a principal or under a theory of accountability. People v. Cobb, 97 Ill. 2d 465, 476 [455 N.E.2d 31, 35] (1983). An accomplice is one who could himself have been indicted for the offense either as a principal or as an accessory. Cobb, 97 Ill. 2d at 476 [455 N.E.2d at 35]. There was no evidence here that DeShon shot and killed the victim. Nor was there probable cause to believe she aided or abetted in the killing. DeShon was merely present at the scene of the crime–a fact

insufficient to show probable cause of guilt under a theory *[p. 16]* of accountability. See Cooper, 194 Ill. 2d at 434 [743 N.E.2d at 42]. The trial court did not abuse its discretion in omitting IPI 3.17.

II. Admission of gang evidence

Defendant contends the introduction of prejudicial gang evidence denied him a fair trial. He contends evidence of a street fight between the victim and a Simon City Royals gang member should not have been admitted to show motive because there was no indication Bomkamp, Martinez, or defendant knew about the fight. Defendant also contends the amount of gang evidence admitted at trial was excessive, especially Officer Rodriguez's testimony about the general organization of gangs, including the Imperial Gangsters and Simon City Royals, gang colors, symbols, hand signals, and the tattoos found on Bomkamp, Martinez, defendant, and the victim.

We will reverse a conviction based on the admission of gang evidence only if the trial court abused its discretion in admitting it. People v. Johnson, 208 Ill. 2d 53, 102 [803 N.E.2d 405, 433] (2003). Gang evidence is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. Johnson, 208 Ill. 2d at 102 [803 N.E.2d at 433]. "Evidence of gang affiliation is

relevant if it tends to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence." Johnson, 208 Ill. 2d at 102 [803 N.E.2d at 433]. *[p. 17]*

In this case, the State inundated the jury with evidence about street gangs. Joe Rodriguez, whom the prosecution referred to as "Gang Specialist Rodriguez," gave the jury an in-depth lesson on street gangs in Chicago, describing their structure, territories, and alliances. He covered every topic from the colors gang members wore to the graffiti symbols they use to mark their territory. He also reviewed 19 photographs introduced by the prosecution. Each photograph depicted tattoos belonging to Bomkamp, Martinez and defendant. Rodriguez testified how each tattooed symbol represented gang membership.

Officer Ricciardi also testified at length about Chicago street gangs, their territories, colors, and allegiances. Another officer testified about defendant's tattoos, several of which included the words "Simon City Royals."

The prosecution's opening statement and closing argument were peppered with references to gangs. The assistant State's attorney referred to defendant's gang, its colors, hand signs, and tattoos. Twice, he argued the victim's participation

in an earlier gang fight was defendant's motive to commit murder.

Although this extensive amount of gang evidence was allowed, there was no evidence the defendant was aware of the so-called motivating fact–a street gang fight six months before the killing. See People v. Smith, 141 Ill. 2d 40, 56-57 [565 N.E.2d 900, 906-07] (1990). The effect, if not the purpose, of the gang evidence was to stir the *[p. 18]* emotions of the jury. Probative value was virtually nil. We find the admission of this evidence was reversible error.

III. Validity of the Indictment

Defendant contends counts I and II of the indictment are void because they allege duplicitous mental states. Defendant also maintains count II of the indictment, which charges felony murder, is void because it is premised on aggravated battery. Our review is de novo. See People v. Edwards, 337 Ill. App. 3d 912, 921 [788 N.E.2d 35, 43] (2002).

Count I of the indictment charges that defendant committed first degree murder in that he, without lawful justification, "intentionally or knowingly," shot the victim with a gun in violation of section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1)(West 1998)). (Emphasis added.) Count II charges that

defendant committed first degree murder in that he, without lawful justification, "shot and killed [the victim] with a gun knowing that such shooting with a gun created a strong probability of death or great bodily harm to [the victim]" in violation of section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2)(West 1998)). Defendant contends both charges are void because they are duplicitous.

Duplicity occurs when two or more distinct offenses are joined in the same count of an indictment. Edwards, 337 Ill. App. 3d at 921 [788 N.E.2d at 43]. An indictment is not duplicitous if it charges a *[p. 19]* single offense in more than one way or pleads different acts contributing to the ultimate charged offense. Edwards, 337 Ill. Ap. *[sic.]* 3d at 921 [788 N.E.2d at 43]. A duplicitous indictment does not set forth the nature and elements of the charge with certainty, rendering the complaint void. Edwards, 337 Ill. App. 3d at 921 [788 N.E.2d at 43].

Counts I and II of defendant's indictment are not duplicitous. They charge defendant with distinct offenses: first degree murder under section 9-1(a)(1) of the Code and first degree murder under section 9-1(a)(2) of the Code. There has been no joining of offenses in separate charges.

The cases relied on by defendant are distinguishable. See People v. Eagle Books, Inc.,

151 Ill. 2d 235 [602 N.E.2d 798] (1992); People v. Capitol News, Inc., 137 Ill. 2d 162 [560 N.E.2d 303] (1990); People v. Heard, 47 Ill. 2d 501 [266 N.E.2d 340] (1970). The supreme court in those cases held an indictment that charges a defendant in the disjunctive is void if it alleges disparate and alternative acts, any one of which would constitute the offense. Eagle Books, 151 Ill. 2d at 244-45 [602 N.E.2d at 801-02]; Capitol News, 137 Ill. 2d at 174-75 [560 N.E.2d at 308-09]; Heard, 47 Ill. 2d at 504 [266 N.E.2d at 342]. Counts I and II of defendant's indictment use the disjunctive to allege defendant's mental state. They do not allege disparate and alternative acts. Use of the disjunctive in these circumstances did not cause uncertainty or conjecture as to the crime defendant was charged with committing. People v. Viser, 62 Ill. 2d 568, 580 [343 N.E.2d 903, 909] (1975) (indictment charging alternative mental *[p. 20]* states for murder does not implicate duplicity concerns).

Because we find counts I and II were properly charged, we need not consider defendant's argument with respect to count III–felony murder. See People v. Cardona, 158 Ill. 2d 403, 411 [643 N.E.2d 720, 723] (1994) ("[a] general finding of guilty is presumed to be based on any good count in the indictment to which the proof is applicable").

Additionally, because we are reversing defendant's conviction and remanding his cause for a new trial, we do not decide defendant's remaining contentions regarding the sufficiency of the State's eyewitness evidence or its alleged failure to prove his guilt on a theory of accountability. We remand because we find there is sufficient evidence to support a guilty verdict.

CONCLUSION

For the above-stated reasons, we reverse defendant's conviction and remand the cause for a new trial.

Reversed and remanded.

Wolfson, J., with Burke, J., concurring.

Cahill, P.J., dissenting. *[p. 21]*

JUSTICE CAHILL, dissenting:

I respectfully dissent. The appellate muddle over I.P.I. 3.15 was resolved by our supreme court in People v Herron, 215 Ill. 2d 167 [830 N.E.2d 467] (2005), as the majority correctly notes. Giving the instruction in its old form has been held to be plain error under Herron, reduced to harmless error only if the evidence is not closely balanced. The majority then finds the evidence

close balanced in this case because "the testimony of a drug-intoxicated witness" was the principal evidence introduced by the State. In fact, the only evidence offered by the defendant was the attempted impeachment of the credibility of that witness. So it could be argued from this record that the evidence is not closely balanced: the drug-using intoxicated witness stuck to her story in the face of withering cross-examination by brilliant defense counsel under the glare of juror scrutiny.

The majority criticism of gang crimes evidence is equally unpersuasive. The evidence offered by the State was within the boundaries announced in People v Johnson, 208 Ill. 2d 53 [803 N.E.2d 405] (2003), and in keeping with the right of the State to show motive for otherwise inexplicable acts. The record reveals a senseless gang rivalry, punctuated by ruthless responses to perceived slights. Of course it is prejudicial. But it is also probative and the jury had a right to hear about this apparently senseless *[p. 22]* assassination in context. To shield a jury from the State's theory of the case hardly creates an even playing field for a criminal trial.

This defendant received a fair trial. I would affirm.

APPENDIX H

NOT RECOMMENDED FOR PUBLICATION

No. 92-1406

FILED
Jun 10 1993
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID A. BUNKER,	)	90-71098
	)	[Judge] Rosen
Petitioner-Appellant,	)	3-24-92
	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
JOHN JABE, Warden;	)	COURT FOR THE
and FRANK J. KELLEY,	)	EASTERN DISTRICT OF
Attorney General,	)	MICHIGAN
	)	
Respondents-Appellees.	)	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

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BEFORE: MARTIN and NORRIS, Circuit Judges; COFFIN, Senior Circuit Judge.*

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* The Honorable Frank M. Coffin, Senior Circuit Judge, United States Court of Appeals for the First Circuit, sitting by designation.

PER CURIAM. Petitioner, David A. Bunker, in this action seeking a writ of habeas corpus, challenges the constitutionality of his 1967 state conviction for murder. In examining the conviction of petitioner's codefendant, Robert E. Casper, upon his petition for a writ of habeas corpus, this court in 1987 held that instructions given to the jury in the joint trial of petitioner and Casper unconstitutionally shifted the burden of proof regarding intend to commit murder, in violation of *Sandstrom v. Montana*, 442 U.S. *[p. 2]* 510 (1979). *Casper v. Grant*, No. 86-1639, 817 F.2d 756 (6th Cir. May 7, 1898) (text in Westlaw), *cert. denied*, 485 U.S. 940 (1988). The court granted the writ. *Id.* In 1989, a plurality of the members of the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), dramatically revised the manner in which courts are to determine whether a new rule of constitutional law should be applied retroactively to convictions that became final prior to the articulation of the new rule.[1] According to *Teague*, habeas corpus petitioners no longer may claim the benefit of rules announced after their direct appeals are exhausted, unless retroactive application is warranted under narrow exceptions set out in the opinion. Although this court had consistently applied the rule of *Sandstrom* retroactively to habeas petitioners prior

[1] A majority of the Court embraced the *Teague* framework in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

to the decision in *Teague*, this court in 1991 relied upon the *Teague* analysis to conclude that *Sandstrom* no longer would enjoy retroactive application. *Cain v. Redman*, 947 F.2d 817 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1299 (1992).

Reviewing this case law, the district court expressed dismay at the prospect of treating Casper and Bunker differently, but concluded that it was required to do so by our opinion in *Cain*. We have before us the district court's order denying Bunker's petition.

Notwithstanding the general applicability of our ruling in *Cain*, this appeal presents us with the idiosyncratic situation in which the timing of a case announcing a *[p. 3]* new rule of retroactivity threatens to subject two codefendants in a case arising from the same facts to different legal standards.

Bunker and his codefendant Casper, were convicted at the conclusion of the same trial, by the same jury. In *Casper*, we held that the jury instruction given in the joint trial was constitutionally infirm and that Casper was therefore entitled to a writ of habeas corpus. Now, under *Teague* and *Cain*, we are being asked to declare that the same instruction is no longer infirm as to petitioner.

As the Ninth Circuit said in a case where a codefendant had been subjected to an erroneous speedy trial ruling while his codefendants had received a favorable ruling on the same point, the principle that like cases be treated alike is "particularly strong . . . when the two cases are not merely factually alike or even factually identical, but arise from the same facts." *Walter v. United States*, 969 F.2d 814, 817 (9th Cir. 1992). See also *United States v. Anderson*, 584 F.2d 849, 853 (6th Cir. 1978) ("manifest injustice" to allow conviction of one codefendant to stand while ordering new trial for other codefendant based upon error in admitting evidence).

This principle, that like cases be treated alike, seems to us to fall within the spirit, if not the letter, of the law of the case doctrine, one example of which is the influence of a prior ruling "of the same court . . . acting within the framework of a single case or closely related cases." 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4478 (1981). *[p. 4]*

We therefore feel constrained on this record to hold that the jury instruction in petitioner's case be viewed as it was in codefendant Casper's case.

Accordingly, because we conclude that the error committed by the trial court was not harmless, we **reverse** the judgment of the district court, and

remand this cause to that court with instructions to **issue a writ** of habeas corpus directing the state of Michigan to discharge petitioner from custody unless it elects to afford him a new trial within ninety days of the issuance of the writ.